

**American Arbitration Association
Arbitration Pursuant to Agreement of the Parties
Before Timothy J. Brown, Esquire**

In the matter of:

Fraternal Order of Police, Lodge #5

and

City of Philadelphia

(Discharge of P/O Aisha B Pleasant)

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AAA Case No. 14 390 01252 12

Decision and Award

Appearances:

On behalf of FOP Lodge # 5;

Marc Gelman, Esquire
Jennings Sigmond PC
510 Walnut Street, 16th Floor
Philadelphia, PA 19106-1595

On behalf of the City of Philadelphia:

Cara Leheny, Esquire
City of Philadelphia Law Department
Labor & Employment Unit
1515 Arch Street, 16th Fl
Philadelphia, PA 19102



Dated: July 3, 2014

Timothy J Brown, Esquire
Arbitrator

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement (the Agreement) between **Fraternal Order of Police, Lodge #5** (referred to herein as the FOP or the Union) and **The City of Philadelphia** (the City or the Employer). The Union filed a timely grievance challenging the August 30, 2012 dismissal of Police Officer Aisha Pleasant (referred to herein as Grievant). The parties were unsuccessful in resolving the grievance through their grievance procedure and the Union thereafter filed a timely demand for arbitration. The parties selected the undersigned as arbitrator through the processes of the American Arbitration Association (AAA) to conduct a hearing on the grievance and render a final and binding arbitration award. The matter was heard by the undersigned on June 9, 2014 in Philadelphia, Pennsylvania. All present were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Grievant was present for the entire hearing and testified on her own behalf. Following the hearing the parties elected to present oral post-hearing closing argument, upon the receipt of which by the Arbitrator the dispute was deemed submitted at the close of business June 9, 2014.

This decision is made following careful consideration of the entire record in the matter including my observations of the demeanor of all witnesses.

Issues

The parties stipulated that there are no procedural bars to presentation of the matter; that the matter is appropriately before the arbitrator; that the arbitrator has the authority to render a final and binding decision and award in the matter and that the issue or issues presented may accurately be stated as:

Did the City of Philadelphia have just cause to terminate Police Officer Aisha Pleasant and, if not, what shall be the remedy?

FACTS

Introduction

Prior to her termination Grievant had been a police officer with the City for approximately three and a half years. On August 3, 2012 Grievant was served with a Statement of Charges alleging unbecoming conduct on her part and by subsequent Notice of Dismissal was informed that she was dismissed from her positions with the City for the following reasons:

CONDUCT UNBECOMING AN EMPLOYEE. SECTION 1.S026-10: Engaging in any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than one (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (relating to Theft and Related Offenses). Also includes any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. Neither a criminal conviction or the pendency of criminal charges is necessary for disciplinary action in such matters.

In that on Sunday, March 4, 2012, while off-duty, you were a patron in One Atlantic, a ballroom located on the 4th floor inside the 1 Pier at Caesar's, off of the Atlantic City boardwalk, Atlantic City, New Jersey. You got into a dispute with management and were escorted from the premises. You returned and punched an on-duty officer, and then left. When you returned a second time, your friends informed Atlantic City Police Officers that you were, in fact, a sergeant from the Philadelphia Police Department. The officers instructed your friends to take you away from the location, but you returned a third time. While being escorted from the location by Officers J [REDACTED] H [REDACTED] # [REDACTED], you used your body-weight to pull away from Officer H [REDACTED] and bit him on the right hand. When you were taken into custody, you were unable to provide any identification but informed the officers of your name, address and date of birth. Atlantic City police contacted the Philadelphia Police Department who confirmed that you were a Philadelphia Police Officer.

By your actions, you have indicated that you have little or no regard for your responsibility as a member of the Philadelphia Police Department. Therefore, you will be dismissed after being placed on a thirty day suspension.

On August 3, 2012, in the presence of Captain Frank Gramlich #90, Internal Affairs Division, Captain D [REDACTED] M [REDACTED] # [REDACTED], 9th District, Sergeant Stephanie Williams #8848, Internal Affairs Division, Sgt. Julius Tate #571, Internal Affairs Division, Gerald Stanshine, Attorney, Fraternal Order of Police, and John McGrody, Representative, Fraternal Order of Police, you were given your Criminal Gniotek warnings and an opportunity to respond to the above allegations. You chose not to respond. You were placed on an immediate 30 day suspension, with the intent to dismiss.

Evidence

The City offered the testimony of Atlantic City Police Officer J [REDACTED] H [REDACTED] who was present during the incident that eventually led to Grievant's dismissal. H [REDACTED] has been an officer with the Atlantic City Police Department for nine years. He recalled that on the evening in question in March 2012 he was on a detail at the Caesar's Pier venue along with fellow Atlantic City Police Officer B [REDACTED] H [REDACTED]. He recalled that at one point in the evening he was approached by security who informed him that they had a group of female patrons who were refusing to leave the premises. H [REDACTED] and H [REDACTED] accompanied security to the group of patrons and informed them that they needed to leave. According to H [REDACTED], all of the women agreed to leave with the exception of Grievant who was argumentative. H [REDACTED] recalled that Grievant had a smell of alcohol emanating from her person, kept repeating herself and appeared intoxicated. He recalled that Grievant argued that she had a right to stay and continued her argument for approximately 20 minutes. Eventually, H [REDACTED] recalled, Grievant's girlfriends talked

her into leaving. The officers determined to escort the group out of the venue using the back fire escape stairwell rather than walking through the venue floor.

Officer H [REDACTED] testified that at some point as they were walking down the six-flight stairwell Grievant informed him that she was a Sergeant with the Philadelphia Police Department. According to H [REDACTED], the women were cooperative for the most part as they were proceeding down the stairs until one point when Grievant changed her mind and tried to return up the stairs. H [REDACTED] testified that he told Grievant she did not want to be arrested; that as an officer she did not want to have a record, and that Grievant responded to his statements by telling him to “go fuck yourself” and grabbed the stair railing. Grievant would not let go of the railing and, H [REDACTED] recalled, he then announced that as she was non-compliant she was being arrested. H [REDACTED] next attempted to pry Grievant’s hands off of the railing in order to cuff her, an action to which Grievant responded by biting the officer’s hand.

Once handcuffed, H [REDACTED] continued to recall, Grievant was enraged and had to be picked up by the two police officers and carried down the stairs. At one point during that process, according to H [REDACTED], Grievant attempted to wrap her legs around H [REDACTED]’s legs causing the two officers and Grievant to almost fall down the stairs. All the while Grievant’s friends continued to tell Grievant to cooperate. Once down the stairwell, Grievant refused to walk and the Officers had to carry Grievant approximately 200 yards to their patrol car, a process that culminated in the officers having to force Grievant into the back of the patrol car as she kicked at the door preventing it from closing. Once at the Police station, H [REDACTED] continued, Grievant again refused to walk and had to be carried in, and continued to be uncooperative refusing to give information such as her address.

Atlantic City Police Officer B [REDACTED] H [REDACTED] corroborated much of Officer H [REDACTED]'s testimony relating to Grievant's actions including her uncooperativeness, grabbing the stair railing, biting Officer H [REDACTED]'s hand, telling the officers to go fuck themselves, refusing to walk requiring that she be carried, resisting efforts to be put into the patrol car and kicking at the doors of the patrol car.

According to Officer H [REDACTED], criminal complaints were eventually issued against Grievant for Aggravated Assault, Resisting Arrest and Obstruction of Justice; all of which are considered "indictable" in New Jersey and therefore felonies, H [REDACTED] explained.

The Investigation

Sergeant Stephanie Williams of the Philadelphia Police Department, Internal Affairs Division, was assigned to investigate the matter. Williams reviewed all of the Atlantic City Police Department reports, interviewed a civilian witness, reviewed criminal complaint warrants and medical documentation that reflected Grievant had been treated for acute alcohol intoxication and anxiety/panic attacks while in police custody on March 4, 2012, reviewed video footage and communicated with the Atlantic City Prosecutor's Office. In regard to the Prosecutor's Office, Williams testified, she learned that Grievant had been indicted for Resisting Arrest and Aggravated Assault on a Policeman. When given the opportunity, Grievant declined to give a statement to Williams in response to these charges.

The record also establishes that all Pennsylvania Police Officers must be certified by MPOETC and that such certification will not be issued for an officer who has a felony on his or her record.

Atlantic County Pre-Trial Intervention Program

The record reflects that following her arrest and indictment, Grievant agreed to participate in the Atlantic County Pre-Trial Intervention Program (PTI). Under that program Grievant pled guilty to one count of resisting arrest by physical force or violence, a third degree crime with a maximum sentence of five years and maximum fine of \$15,000.00. Under the program, she agreed to comply with certain probation-related requirements.

Grievant complied with the requirements of the PTI and received a letter from the Superior Court of New Jersey (Vicinage 1) dated December 13, 2013 stating, in relevant part:

As a result of your successful participation in the Atlantic County Pre-Trial Intervention Program, the charges for which you became enrolled have been dismissed... The Order means that your records are now marked “dismissed.” Additionally, **after** six (6) months you are eligible to have these records expunged or sealed under N.J.S.Aa.2C:52-6....

(Emphasis in original)

Grievant

On the witness stand Grievant confirmed that as a consequence of her participating in the Pretrial Intervention Program, at the time of the arbitration hearing her arrest complaint had been “dismissed,” but that the charges had not yet been expunged.

Grievant testified that she began her employment with the City in November 2008 and during her time with the Department had received no discipline. Grievant testified that she was intoxicated during the March 4, 2012 incident but that she recalls that at

some point during the back and forth with the Atlantic City Police Officers she identified herself as a Philadelphia Police Officer. She testified that she does not recall biting any officer, does recall swearing at the officers but does not recall telling them to fuck themselves. According to Grievant the officers were being physically aggressive with her and her girlfriends; pushing them along. She explained that she was in high heels and that as the officers were dragging her down the stairwell she grabbed the railing and tried to stop the officers from pushing her. According to Grievant, the officers did not “carry” her anywhere that evening, rather they “dragged” her down the stairs and to the patrol car. She also recalled having a panic attack at the police station and going to the hospital for treatment.

Grievant admitted that she had been arrested and that there were criminal charges filed against her. She testified that she was offered the Pretrial Intervention (PTI) by the court, a program she was told was for people who had not been in prior trouble. She accepted the offer of the program, and testified that as part of the program she was required to plead guilty to the charge of aggravated assault. It was further explained to her, Grievant testified, that if she complied with the program, a program that included attending anger management classes, reporting to a Parole Officer and submitting to drug tests, the criminal complaint against her would be dropped. She successfully completed the PTI program and was informed by letter dated December 13, 2013 that the charges against her subject to the program had been marked “dismissed” as of December 3, 2013.

Decision to Dismiss

Following the completion of the IAD investigation, report and recommendation to dismiss, the matter was forwarded for Commissioner's Direct Action. According to Police Commissioner Ramsey, the regulations do not require an actual felony conviction, to warrant dismissal. The Commissioner testified that he reviewed the investigation and report and approved the dismissal due to the egregious conduct of Grievant; including the facts that Grievant had physically attacked an on-duty police officer and had been arrested and indicted.

Positions of the Parties

The Employer

The City has shown just cause for the discharge of Grievant, the Employer argued. The rule here is important, clear and has a long history of consistent application; officers who engage in misconduct that amounts to a felony are discharged. The rule does not require a conviction, the City asserted. Additionally, the City continued, the Atlantic City Police Officers who testified were credible and Grievant, who admitted being intoxicated during the incident, was not. Considering the credible testimony of the City's witnesses and documentation, the City asserted, the evidence establishes that Grievant engaged in the conduct alleged in the felony criminal complaints and indictments against her. She cursed, fought, bit, tripped, argued with and refused to cooperate with on duty Atlantic City Police Officers. She pled guilty to aggravated assault of an officer, a third degree felony with up to a five year prison sentence, and that guilty plea was still on the court's records as of the time of the hearing, the City observed.

Considering that Grievant engaged in the conduct alleged and is not certifiable to be a police officer in the state of Pennsylvania as she is not eligible for certification by MPOETC, the City had just cause to dismiss Grievant, the City concluded.

The Union

According to the Union, it should be remembered that this is a just cause case and there are really two issues that should receive the arbitrator's focus: (1) the conduct alleged and (2) the expungement and MPOETC certification. In this regard, the questions concerning conduct of Grievant go to the usual just cause issues and the matter of expungement and certification should be limited to questions of remedy.

Concerning the conduct at issue, the Union argued, the analysis should be; (a) what was the conduct, (b) did it violate the Code and (c) does it warrant termination?

In its view, the Union asserted, Grievant should be credited as to what happened in the stairwell on March 4, 2012. She was wearing high heels, it is not a stretch to believe that the officers were attempting to hurry the group of women along and caused Grievant to try to hold onto the railing. As for the claim that Grievant bit an officer, the Union continued, it is odd under the circumstances and considering our societies overriding concern about contagions that the police officer claiming to have been bitten did not seek medical attention. It doesn't make sense, the Union argued. Nor should Grievant's plea of guilty be considered as evidence that she actually engaged in the conduct, the Union asserted. The plea was merely a means to an end for Grievant to assure that her record is clean. Just cause requires that the conduct be determined based upon the actual facts rather than Grievant's participation in the PTI program, the Union maintained.

Considering the actual facts, the Union asserted, Grievant's conduct was not as egregious as claimed by the City and does not warrant dismissal.

As for remedy, the Union continued, under the terms of the court's order, Grievant was not able to move for expungement of her criminal record at any time prior to June 3, 2014, and there is nothing prohibiting the arbitrator from issuing a conditional order contingent upon Grievant having the criminal record expunged and renewing her MPOETC certification. The Arbitrator should do just that, the Union concluded, and order Grievant reinstated and made whole.

Discussion

Just Cause

An analysis of a case claiming discipline for just cause as is presented here requires consideration of all of the circumstances presented to determine whether the discipline at issue was "fair." There is no single formula for making such a determination and each case must be considered based upon its own unique set of facts and circumstances. Some, but not all, of the several factors often considered by arbitrators when applying the just cause standard include whether or not; (1) the employer relied on a reasonable rule for the disciplinary action, (2) there was prior notice to the employee of the rule and the consequences for violating the rule, (3) the disciplinary investigation was adequately conducted and Grievant was provided a reasonable amount of due process, (4) the employer was justified in concluding that the employee engaged in the conduct as charged, (5) the discipline issued was appropriate relative to the gravity of the offense given the employee's disciplinary record and appropriate use of progressive discipline and (6) the discipline has been consistently applied to other employees charged with

violation of the same or similar rules. It is the Employer's burden to show that its decision to discipline satisfies the requirements of the just cause standard.

Based upon the record as a whole I find that the City has met its burden of establishing just cause for the discharge of Grievant.

The primary issues presented here by the Union revolve around the questions of; (1) whether the Employer was justified in concluding that Grievant engaged in the conduct for which she was terminated and (2) whether the level of discipline issued against Grievant was appropriate relative to the gravity of her offense. I find that Grievant engaged in the conduct alleged. In coming to this conclusion I rely upon the credible testimony of Officers H [REDACTED] and H [REDACTED]. Both officers were straightforward and clear in the testimony, neither evidenced any grudge whatsoever against Grievant and – in contrast to Grievant - both testified about matters that took place when they were not intoxicated. Based upon the testimony of these officers, I find that Grievant engaged in actions that “constitutes the commission of a felony” within the meaning of Section 1.S026-10. This is so regardless of whether the criminal charges against Grievant have been dismissed or could be expunged. The determinative finding here is that Grievant engaged in the prohibited conduct. In this regard, I find that the evidence establishes that Grievant assaulted the officers by kicking and tripping both and by biting Officer H [REDACTED]; she resisted arrest and showed disrespect toward the officers in front of others that reflected loathing of the officers, their position as public servants and the position of police officers generally.

Under such circumstances, where the Employer has shown that Grievant, a relatively short term employee, engaged in egregious conduct that plainly violated such

an important rule, I find that the City has met its burden of showing just cause for the dismissal of Grievant.

Conclusions

The Employer has met its burden of showing just cause for the dismissal of Grievant.

AWARD

The grievance is denied.

A handwritten signature in black ink, appearing to read "Timothy J. Brown", with a long horizontal flourish extending to the right.

Dated: July 3, 2014

Timothy J. Brown, Esquire
Arbitrator